1986

Ben A. Kirsling v. Fred C. Schwendiman, Chief Driver License Services, State of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BEN A. KIRSLING,	:	860161 CA
Plaintiff/Appellant,	:	Case No. 21061
vs.	:	
FRED C. SCHWENDIMAN, Chief Driver License Services, State of Utah,	:	Priority No. 2
Defendant/Respondent.	:	

BRIEF OF RESPONDENT

APPEAL FROM SUSPENSION OF APPELLANT'S DRIVER'S LICENSE PURSUANT TO UTAH CODE ANN. § 41-2-19.6 (SUPP. 1986)

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Appellant was charged with driving under the influence of alcohol in violation of Bountiful City Code No. 8-4-501. At the time of appellant's arrest the arresting officer gave appellant notice of intent to suspend his driver's license pursuant to Utah Code Ann. § 41-2-19.6 (Supp. 1986).

At a hearing before the Office of Driver License Services on May 30, 1985, the appellant's license was suspended for 120 days pursuant to Utah Code Ann. § 41-2-19.6 (Supp. 1986). The suspension was affirmed on appeal on November 7, 1985 in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Douglas Cornaby, Judge, presiding. Appellant now appeals from that order.

STATEMENT OF FACTS

On May 2, 1985 at 5:35 p.m., Officer Clay Kone received a call from his dispatcher regarding a citizen's report of a possible drunk driver (R. 24). The dispatcher indicated the

vehicle's make, color and probable direction of travel (R. 30). Officer Kone first observed appellant in the same make and color of car described by the dispatcher travelling westbound on 1800 South at approximately 350 East (R. 24). The appellant made a wide curve and nearly crossed over the double yellow line (R. 24). The officer followed appellant when he turned into St. Olaf's lot (R. 25). When the officer approached appellant he smelled alcohol on appellant's breath and observed appellant's eyes to be bloodshot (R. 26). Appellant agreed to perform field sobriety tests (R. 26). He performed poorly on the nystagmus test and alphabet count test (R. 26, 46). The officer believed that appellant had been operating a motor vehicle while under the influence of alcohol and he placed appellant under arrest. He asked appellant to take a breathalyzer test (R. 46) and appellant consented (R. 46). The breath test results showed a blood alcohol content of .28% (R. 27, 46). Appellant's license was suspended after a hearing before a hearing officer and this order was affirmed on appeal in the District Court. Appellant now appeals the suspension.

SUMMARY OF ARGUMENT

Utah Code Ann. § 41-6-16 (1981) grants local authorities the power to adopt additional traffic regulations consistent with Title 41 of the Utah Code. Accordingly the arresting officer properly arrested appellant for violation of Bountiful City Code No. 8-4-501. Once appellant was arrested for driving while under the influence of alcohol, the officer appropriately gave appellant notice of intent to suspend his license under Utah Code Ann. § 41-2-19.6 (Supp. 1986).

The right to drive is a privilege subject to certain conditions. Utah Code Ann. § 41-2-19.6 (Supp. 1986) authorizes the suspension of a license if the driver has a blood alcohol level of .08% or more. The suspension of appellant's license pursuant to § 41-2-19.6 is not a criminal sanction and thus § 41-2-19.6 is constitutional.

Based upon the call from the dispatcher, the arresting officer had a reasonable suspicion that appellant was driving while intoxicated and thus the stop of appellant was justified.

Appellant's consent to perform the field sobriety tests did not violate his privilege against self-incrimination, since the appellant was not under arrest and the officer was still in the investigatory stage. Appellant's performance on the breathalyzer was also admissible since this case is a civil case, not criminal, and since Hansen v. Owens, 619 P.2d 315 (Utah 1980) has been overruled.

ARGUMENT

POINT I

THE ARRESTING OFFICER HAD AUTHORITY TO ACT PURSUANT TO THE BOUNTIFUL CITY ORDINANCE AND UTAH STATE CODE.

Appellant argues that a license can only be suspended under Utah Code Ann. § 41-2-19.6 (Supp. 1986) when an officer has reasonable grounds to believe that a person may be violating Utah Code Ann. § 41-6-44 (Supp. 1986). Specifically, appellant argues that because the officer arrested appellant for violation of Bountiful City Code No. 8-4-501 not Utah Code Ann. § 41-6-44 that the officer did not have authority to suspend appellant's

license. Appellant does not challenge the constitutionality of the Bountiful City Ordinance.

Utah Code Ann. § 41-6-16 (1981) expressly grants local authorities the power to adopt additional traffic regulations consistent with Title 41 of the Utah Code. See also Utah Code Ann. § 41-6-43 (Supp. 1986). Bountiful City, in accordance with this authority, has passed a municipal law prohibiting persons from driving a motor vehicle while intoxicated. A copy of Bountiful City Code No. 8-4-501 is contained in Addendum A.

Both the Utah statute and the Bountiful ordinance require the police officer to have reasonable cause to believe a violation has been committed. Accordingly, since Officer Kone had reasonable cause to believe that appellant was driving while under the influence of alcohol, the appellant was properly arrested for driving while the the influence of alcohol and cited for violating the Bountiful City Ordinance. Once appellant was arrested for driving while under the influence of alcohol, the officer appropriately gave appellant notice of intent to suspend his license under Utah Code Ann. § 41-2-19.6 (Supp. 1986).

The citation issued by the officer stated not only that appellant had violated Bountiful City Ordinance No. 8-4-501, but also gave appellant specific notice of intent to suspend his license pursuant to Utah Code Ann. § 41-2-19.6 (Supp. 1986) (R. 45).

Finally, Utah Code Ann. § 41-6-16 (1981) states that "the provisions of this act shall be applicable and uniform throughout this state and in all political subdivisions and

municipalities therein." Thus § 41-6-44 was clearly applicable when appellant was arrested for driving while intoxicated. In this case appellant's license was suspended based upon violation of a Bountiful City Ordinance lawfully enacted pursuant to § 41-6-16. Such suspension was according to Utah law and was neither arbitrary nor capricious.

POINT II

UTAH CODE ANN. § 41-2-19.6 (SUPP. 1986) DOES NOT IMPOSE A CRIMINAL PENALTY PRIOR TO A CRIMINAL CONVICTION.

Appellant claims that Utah Code Ann. § 41-2-19.6 (Supp. 1986) is unconstitutional since a driver may lose his driving privilege before he is criminally convicted of driving while intoxicated. Specifically, appellant argues that § 41-2-19.6 imposes the same penalty as if appellant were convicted of the crime of drunk driving (App. Br. at 5).

Section 41-2-19.6 provides that if a driver has a blood alcohol content of .08% or more, the officer shall serve immediate notice of intent to suspend the person's license. The officer shall then take the license and issue a temporary license effective for 30 days and supply the driver with a form on how to obtain a prompt hearing. Upon written request of a driver, the department shall hold a hearing. After the hearing, the department shall order either that the person's license be suspended or that it not be suspended. A copy of § 41-2-19.6 is contained in addendum A. Section 41-2-19.6 clearly does not provide criminal punishment for the crime of driving under the influence of alcohol. Utah Code Ann. § 41-6-44 (Supp. 1986) provides the appropriate criminal punishment.

Appellant appears to argue that an order of suspension is punishment for conviction of a crime. This argument is untenable in light of this Court's ruling that "[t]he right to drive is a privilege conferred subject to conditions; and it may be revoked if those conditions are violated." Wisden v. City of Salina, 709 P.2d 371 (Utah 1985), citing Smith v. Cox, 609 P.2d 1332 (Utah 1980).

Further, this Court has repeatedly ruled that an action in defense of appellant's driving privileges is a civil, not criminal, matter. Larson v. Schwendiman, 712 P.2d 244 (Utah 1985); Smith v. Cox, 609 P.2d 1332 (Utah 1980); Cavaness v. Cox, 598 P.2d 349 (Utah 1979); Ballard v. State, Motor Vehicle Division, 595 P.2d 1302 (Utah 1979). This Court stated in Ballard, 595 P.2d at 1305:

> The revocation proceeding is separate and distinct from a criminal action on a charge of driving under the influence, and a different burden of proof applies.
>
> . . .
>
> The purpose of this administrative procedure is not to punish the inebriated drivers; such persons are subject to separate criminal prosecution for the purpose of punishment. The administrative revocation proceedings are to protect the public, not to punish individual drivers . . .
>
> In fact, acquittal of the defendant under the criminal proceedings is not a bar to revocation of the operator's license. (citations omitted)

Finally, Utah Code Ann. § 41-2-19.6 provides procedural safeguards before a license revocation or suspension becomes final. First, a peace officer issues a temporary license to the driver effective for 30 days, and supplies the driver with

information on how to obtain a prompt hearing before the department. Second, the driver is entitled to a hearing within 30 days after the date of arrest, if such hearing is properly requested. The hearing shall address whether the peace officer had reasonable grounds to believe the person was operating a motor vehicle in violation of Utah Code Ann. § 41-6-44 (Supp. 1986). Third, a person whose license has been suspended may file a petition within 30 days for a hearing in a court of record in the county where such person resides. Utah Code Ann. § 41-2-20 (Supp. 1986). Finally, the driver can appeal to the Utah Supreme Court.

Because this Court has ruled that an action in defense of driving privileges is civil not criminal and § 41-2-19.6 provides appropriate procedural safeguards, § 41-2-19.6 is constitutional.

POINT III

THE ARRESTING OFFICER HAD A REASONABLE SUSPICION THAT THE APPELLANT WAS DRIVING WHILE INTOXICATED, AND THUS THE STOP OF APPELLANT WAS JUSTIFIED.

Appellant argues that the arresting officer stopped him based upon mere suspicion not probable cause and thus, the arrest was unlawful. Specifically, appellant claims the only reason the arresting officer stopped appellant was because of a call from appellant's wife to the dispatcher that appellant may be driving while intoxicated.

When determining whether an investigatory stop of an automobile, like that at issue here, is lawful, the court must ask whether the police officers acted upon "reasonable

suspicion," not "probable cause." United States v. Cortez, 4949 U.S. 411 (1981); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Swanigan, 699 P.2d 718 (Utah 1985); State v. Gibson, 665 P.2d 1302 (Utah 1983).

The appropriate standard for investigate detentions was articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968); and Brown v. Texas, 443 U.S. 47, 51 (1979); and is codified in Utah as follows:

> A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Ann. § 77-7-15 (1982). See also, United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985); United States v. Merritt, 736 F.2d 223 (5th Cir. 1984); State v. Swanigan, 699 P.2d 718 (Utah 1985). The reasonable suspicion standard also applies to investigative stops involving vehicles. United States v. Sharpe, ___ U.S. ___, ___ 105 S.Ct. 1568, 1573 (1985). The reasonable suspicion test for investigatory stops reflects a reasonable and workable approach to the question of whether a particular stop is constitutional. It strikes an appropriate balance between the promotion of legitimate governmental interests and the individual's interest in being free from intrusions on fundamental constitutional rights. Illinois v. LaFayette, 462 U.S. 640, 644 (1983); Delaware v. Prouse, 440 U.S. 648, 655 (1979).

This Court considered the "informal arrest" or stop and detention situation in State v. Torres, 29 Utah 2d 269, 508 P.2d 534 (1973). In that case, this Court said that the test to be applied on the question as to whether appellant's constitutional rights have been abridged:

> [i]s one of reasonableness: that is, whether fair-minded persons, knowing the facts, and taking into consideration not only the rights of the individuals involved in the inquiry or search, but also the broader interests of the public to be protected from crime and criminals, would regard the conduct of the officers as being unreasonable [footnote omitted].

29 Utah 2d at 271, 508 P.2d at 536. See also, Terry v. Ohio, 392 U.S. 1 (1968). Furthermore,

> The determination should be made on an objective standard: whether from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense. State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1295 (1972).

State v. Whittenback, 621 P.2d 103, 106 (Utah 1980).

To justify the stop of appellant the officer must have had "a reasonable suspicion, based on objective facts," that appellant was committing a public offense. State v. Swanigan, 699 P.2d 718, 719 (Utah 1985) quoting Brown v. Texas, 443 U.S. 47, 51 (1979); Utah Code Ann. § 77-7-15 (1982). The reasonableness of the detention must be judged by an objective standard, i.e., "would the facts available to the officer at the moment of the seizure or the search 'warrant of a man of reasonable caution in the belief' that the action taken was

appropriate?" Terry v. Ohio, 392 U.S. 1, 21-22 (1968); see also, State v. Carter, 19 Utah Adv. Rep. 26 (Sept. 27, 1985).

Appellant claims that the only reason the officer stopped appellant was because of the dispatcher's call, "which was based on double hearsay evidence from a third person." (App. Br. 6).

In State v. Elliott, 626 P.2d 423 (Utah 1981), this Court upheld an investigatory stop based on a citizen's report that the defendant was trying to sell tires and auto parts at a reduced price in order to buy gas. This Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in or to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [Citations omitted.]

Elliott, 626 P.2d at 425, citing Adams v. Williams, 407 U.S. 143, 145 (1972).

This case is also similar to State v. Sharp, 702 P.2d 959 (Mont. 1985). There, a citizen called the police to report a possible drunk driving offense and gave the dispatcher the car's license plate number, description and the direction of travel. These facts were corroborated when the officer found the described vehicle stopped halfway off the road in the direction and on the highway reported by the caller. The driver began to

pull away when the officer approached the car. The Court found that the officer had a right based on reasonable suspicion and logical inference, to stop the defendant's vehicle. Sharp, 702 P.2d at 962.

The informer in the instant case was a citizen, the appellant's wife, not a professional informer. Because the citizen informer witnessed the activity, described the make and and color of the vehicle and its direction of travel, and identified herself to the dispatcher, the information is sufficiently reliable. People v. Donnelly, 691 P.2d 747, 749 (Colo. 1984). See also, State v. Sharp, 702 P.2d 959 (Mont. 1985) (information provided by a citizen informant is presumptively reliable); City of Nome v. Ailak, 570 P.2d 162 (Ala. 1977) (if informant is a cooperative citizen, his reliability need not be established before arrest on basis of information supplied by him).

The circumstances present in the instant case were sufficient to give rise to the reasonable suspicion required for the stop of appellant. The officer received a call from his dispatcher regarding Mr. Kirsling (R. 29, 34). A citizen called the police department and reported that Mr. Kirsling was driving a silver Lincoln and may be intoxicated (R. 29-30). Although the officer initially testified that the only reason he stopped appellant was because of the call from the dispatcher (R. 30), the officer also testified that when the appellant drove past the officer, the appellant was hunched over staring straight ahead and had the manner of an intoxicated person (R. 25, 29), and

based upon these observations the officer would have stopped Kirsling without the call from the dispatcher (R. 34). The officer also observed appellant approach the center line of the road and jerk away from the center line when he went into a turn (R. 24, 25). As such, the officer not only had the right, but the duty to make observations and investigations to determine whether the law was being violated. State v. Folkes, 565 P.2d 1125, 1127 (Utah 1977); State v. Whittenback, 621 P.2d 103, 105 (Utah 1980).

Once the officer stopped appellant, the officer detected the odor of alcohol and observed appellant's eyes to be bloodshot (R. 26). Appellant consented to perform field sobriety tests and performed poorly on two of the tests (R. 26, 46). Based upon his observations, the officer obtained a reasonable belief that appellant was intoxicated and placed him under arrest. The officer then requested that appellant submit to a breath test pursuant to Utah Code Ann. § 41-2-19.6(1) (Supp. 1986). Appellant then agreed to a breath test and had a blood alcohol level of .28% (R. 46).

Appellant cites Worthington v. United States, 166 F.2d 557 (6th Cir. 1968)[1] as authority that mere suspicion is not enough to constitute probable cause for arrest without a warrant. Worthington is clearly inapplicable to the facts of the case at bar. The issue in Worthington was whether the officers had probable cause to believe defendant was committing a felony and

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[1] Appellant cites this case as Mallory v. United States, however the correct case name is Worthington v. United States.

whether the warrantless arrest and subsequent warrantless search of defendant's residence was lawful. The present case pertains to a temporary stop and an administrative suspension of a driver's license for driving while intoxicated, not a warrantless arrest and search for a criminal offense.

Appellant's reliance on People v. McGaughran, 25 Cal. 3d 577, 601 P.2d 207, 159 Cal. Rptr. 191 (1979) is also misplaced. In McGaughran, the issue was whether an officer who has stopped a motorist for a traffic violation for which the motorist can not be taken into custody, and has detained the motorist for the period necessary to perform his functions arising from the violation, can thereafter lawfully detain him for an additional period of time solely for the purpose of conducting a warrant check.

Because an officer may stop a driver when the officer has a reasonable suspicion based on objective facts that an offense has been committed and here the officer had reasonable suspicion based on the call from dispatch and his personal observations, the stop was lawful.

POINT IV

THE FIELD SOBRIETY TESTS AND BREATHALYZER TEST DID NOT VIOLATE APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION.

Appellant argues that the police officer in the instant case illegally obtained evidence when he requested appellant to perform field sobriety tests and the breathalyzer test. Specifically, appellant relies upon Hansen v. Owens, 619 P.2d 315 (Utah 1980) and claims that an accused cannot be compelled to

perform any affirmative acts which could be used as "evidence" against him. Appellant argues that because his driver's license was suspended based on probable cause, that the suspension is really a criminal, not a civil sanction.

The State acknowledges that the appellant has a constitutional right not to give evidence against himself if it is to be used against him in a criminal proceeding. Smith v. Cox, 609 P.2d 1332 (Utah 1980). However, the State contends that: (1) the appellant was not compelled to perform field sobriety tests, and (2) the present case is civil, not criminal, in nature and thus Hansen is inapplicable.

In Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983) this Court addressed the issue of whether performance of field sobriety tests constituted giving evidence against oneself under Hansen v. Owens, 619 P.2d 315 (Utah 1980). There, the defendant argued that at the time he was asked to perform the tests he was in custody or otherwise deprived of his freedom and thereby "compelled" to give evidence against himself. This Court found that temporary detention for the purpose of investigating alleged traffic violations is not synonymous with in custody interrogation.

> The officer was still in the investigatory stage when he asked the defendant to perform field sobriety tests. If the defendant's ability to drive a vehicle had not been impaired or was impaired for a reason other than being under the influence, there may have been no crime committed. Therefore, the officer in requesting field sobriety tests, was continuing to ascertain whether a crime had been committed at all. As soon as the officer determined that the defendant's driving appeared to be impaired

> due to alcohol, he did arrest him. Until that time the officer was entitled to investigate circumstances at the scene without giving the defendant a Miranda warning.
>
> Since the defendant was not in custody, or otherwise significantly deprived of his freedom, custody did not compel him to take field sobriety tests. And, nothing suggests that he was compelled in any other way. Defendant was requested and he agreed, both verbally and by attempts at compliance, to perform the field sobriety tests. No facts indicate that he was forced, coerced or intimidated into performing them. Rather, it appears that he performed them voluntarily. We therefore, hold that the defendant was not "compelled to give evidence against himself" in violation of our state constitution.

Carner, 664 P.2d at 1172.

In the instant case the officer was clearly investigating possible criminal activity based upon a call received through dispatch (R. 30). Once the officer stopped appellant the officer detected an odor of alcohol and observed appellant's eyes to be bloodshot (R. 26). Still investigating a possible crime, the officer requested appellant to submit to field sobriety tests (R. 26). Based on appellant's performance on the blood test, the officer determined that appellant was under the influence of alcohol and placed appellant under arrest (R. 26). Just as in Carner, the officer in the instant case was still in the investigatory stage when he asked appellant to perform field sobriety tests. Until the officer arrested appellant there was no deprivation of appellant's freedom and as this Court found in Carner appellant was not compelled to take the field sobriety tests.

Appellant strongly relies upon Hansen v. Owens, 619 P.2d 315 (Utah 1980) as authority that the appellant was compelled to perform an affirmative act. In Hansen this Court held that an accused could not be compelled to furnish examples of his handwriting for use in connection with a charge of forgery against him. This Court found that an order directing the accused to perform the affirmative act of writing violated his constitutional rights since Article I § 12 provides that "The accused shall not be compelled to give evidence against himself." The Hansen court further stated that its holding would be limited to the particular facts of that case. Hansen, 619 P.2d at 317.

This Court overruled Hansen in American Fork v. Cosgrove, 701 P.2d 1069 (Utah 1985). In Cosgrove, this court stated that the affirmative act standard suggested in Hansen has little to recommend itself. This Court then ruled that Article I § 12 is limited to situations where the State seeks evidence of a testimonial or communicative nature. Therefore, "the defendant's rights under the Utah Constitution's self-incrimination provision were not violated when, after his arrest, he was required to submit to a breathalyzer test under the threat of losing his driver's license." Cosgrove, 701 P.2d at 1075.

Appellant's reliance on Hansen is clearly misplaced for several reasons. First, this Court has repeatedly held that a license revocation procedure is civil, not criminal, in nature. Smith v. Cox, 609 P.2d 1332 (Utah 1980); Cavaness v. Cox, 598 P.2d 349 (Utah 1979); Ballard v. State, 595 P.2d 1302 (Utah 1979). As this Court stated in Ballard:

> [T]he revocation proceeding is separate and distinct from a criminal action on a charge of driving under the influence, and a different burden of proof applies. A person refusing a chemical test is not required to post bond for his appearance, nor is he under any legal duty to appear at the administrative hearing in which the determination may be made to revoke the operator's license. He cannot be fined or imprisoned either for his refusal to submit to a test or for his failure to appear at the hearing. If he fails to appear or if the Division of Motor Vehicles determines the person was granted the right to submit to a chemical test and refused, the Division's authority is limited to revocation of the license for one year.

Ballard, 595 P.2d at 1305.[2] Because the issue in the Hansen case pertained to an accused's right not to give incriminating evidence against himself in a criminal proceeding, and the present case is a civil proceeding Hansen is inapplicable.

Further, this Court specifically stated in Hansen, "[w]e do not mean this decision to be understood as going beyond its particular facts." Hansen, 619 P.2d at 317. Since the appellant in the instant case was not ordered to give a handwriting sample in a criminal proceeding, again Hansen is inapplicable.

Finally, this Court addressed an issue similar to the present one in Larson v. Schwendiman, 712 P.2d 244 (Utah 1985). There, the appellant claimed the officer had a duty to advise appellant as to the distinction between the self-incrimination

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[2] Although appellant's license was suspended not revoked this Court's reasoning in Ballard is still applicable since the suspension of a license is also an administrative action. Utah Code Ann. § 41-2-19.6 (Supp. 1986).

provision of the Utah Constitution, Article I § 12 and the United States Constitution, Amendment V. This Court stated, "[w]e need only observe that Hansen is not applicable to this civil proceeding and was overruled by our recent decision in American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985). In Larson, 712 P.2d at 246 the same analysis applies in the case at bar. Because the present case is a civil proceeding and Hansen was overruled, Hansen is inapplicable and this Court should find tha the appellant was not compelled to perform any affirmative acts.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm the trial court and to find that appellant's license was properly suspended.

RESPECTFULLY submitted 7 day of November, 1986.

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KIMBERLY K. HORNAK
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MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing brief to Phil L. Hansen, attorney for appellant, 800 Boston Building, Salt Lake City, Utah 84111, postage prepaid, this 7 day of November, 1986.

ADDENDUM A

41-2-19.6. Chemical test — Grounds and procedure for officer's request — Taking license — Report to department — Procedure by department — Suspension.

(1) When a peace officer has reasonable grounds to believe that a person may be violating or has violated section 41-6-44 the peace officer may, in connection with his arrest of the person, request the person to submit to a chemical test to be administered in compliance with the standards set forth in section 41-6-44.10.

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that results indicating .08% or more by weight of alcohol in the blood shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle can, result in suspension or revocation of the person's license or privilege to operate a motor vehicle.

(3) If the person submits to that chemical test and the results indicate a blood alcohol content of .08% or more, or if the officer makes a determination, based on reasonable grounds to believe that the determination is correct, that the person is otherwise in violation of section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the department, immediate notice of the department's intention to suspend the person's privilege or license to drive. If the officer serves that immediate notice on behalf of the department he shall take the Utah driver license or certificate or permit, if any, of the driver, issue a temporary license effective for only 30 days, and supply to the driver, on a form to be approved by the department, basic information regarding how to obtain a prompt hearing before the department. A citation issued by the officer may, if approved as to form by the department, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the department within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a sworn report indicating the chemical test results, if any, and any other basis for the officer's determination that the person has violated section 41-6-44, and the officer's belief regarding the person's violation of section 41-6-44. Each such report shall be on a form approved by the department and shall be endorsed by the police chief or his equivalent or by a person authorized by him, other than the officer serving the notice.

(5) Upon written request of a person who has been issued a 30-day license, the department shall grant to the person an opportunity to be heard

within 30 days after the date of arrest and issuance of the 30-day license, but the request must be made within 10 days of the date of the arrest and issuance of the 30-day license A hearing, if held, shall be before the department in the county in which the arrest occurred, unless the department and the person agree that the hearing may be held in some other county The hearing shall be documented and its scope shall cover the issues of whether a peace officer had reasonable grounds to believe the person to have been operating a motor vehicle in violation of section 41-6-44, whether the person refused to submit to the test, and the test results, if any In connection with a hearing the department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers One or more members of the department may conduct the hearing, and any decision made after a hearing before any number of the members of the department shall be as valid as if made after a hearing before the full membership of the department After the hearing, the department shall order, either that the person's license or privilege to drive be suspended or that it not be suspended A first suspension, whether ordered or not challenged under this subsection, shall be for a period of 90 days, beginning on the 31st day after the date of the arrest A second or subsequent suspension under this subsection shall be for a period of 120 days, beginning on the 31st day after the date of arrest The department shall assess against a person, in addition to any fee imposed under subsection 41-2-8(7), a fee of $25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealled department-hearing or court decision that the suspension was not proper A person whose license has been suspended by the department under this subsection may file a petition within 30 days after the suspension for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

BOUNTIFUL, A Municipal Corporation

ORDINANCE NO. 83 - 13

AN ORDINANCE AMENDING TITLE VIII, CHAPTER 4, PART 5, SECTIONS 501-504 INCLUSIVE, BY MAKING IT UNLAWFUL: TO DRIVE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS OR A COMBINATION THEREOF; TO DRINK ANY ALCOHOLIC BEVERAGE IN A MOTOR VEHICLE AND TO HAVE AN OPEN CONTAINER IN A VEHICLE, AND PROVIDING FOR PENALTIES IN VIOLATION THEREOF AND REPEALING ALL ORDINANCES, AND PARTS OF ORDINANCES IN CONFLICT THEREWITH.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF BOUNITFUL, UTAH AS FOLLOWS:

Section 1. Title VIII, Chapter 4, Part 5, Sections 501-504 inclusive, of the Revised Ordinances of Bountiful, Utah, 1965, as amended, is hereby amended to read as follows:

PART 5

ALCOHOL AND DRUGS

8-4-501 DRIVING UNDER THE INFLUENCE OF ALCOHOL AND DRUGS

(1) It is unlawful and punishable as provided in this Section for any person with a blood alcohol content of .08 % or greater by weight, or who is under the influence of alcohol or any drug or the combined influence of alcohol and any drug, to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of a vehicle within this City. The fact that a person charged with violating this Section is, or has been legally entitled to use alcohol or a drug, does not constitute a defense against any charge of violating this Section.

(2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred centimeters of blood.

(3) Every person who is convicted the first time of a violation of Sub-section (1) of this Section shall be punished by imprisonment for not less than 60 days nor more than 6 months, or by a fine of two hundred and ninety nine dollars ($299.00) or by both such fine and imprisonment.

(4) In addition to the penalties provided for in Sub-section (3), the Court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 2 nor more than 10 days and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5) Upon a second conviction within five years after a first conviction under this Section, the Court shall, in addition to the penalties provided for in Sub-section (3), impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 10 nor more than 30 days and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility and the Court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility. Upon a subsequent conviction within 5 years after a second conviction under this Section the Court shall, in addition to the penalties provided for in Sub-section (3), impose a mandatory jail sentence of not less than 30 nor more than 90 days with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work project for not less than 30 nor more than 90 days and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility. No portion of any sentence imposed under Sub-section (3) shall be suspended and the convicted person shall not be eligible for parole or probation until such time as any sentence imposed under this Section has been served. Probation or parole resulting from a conviction for a violation of this Section shall not be terminated.

(6) The provisions of Sub-sections (4) and (5) that require a sentencing Court to order a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility, or obtain, mandatorily, treatment at an alcohol rehabilitation facility, or do any combination of those things, apply to a conviction for a violation of Section 8-4-919, of the Revised Ordinances of Bountiful, Utah, 1965, as amended, that qualifies as a prior offense under Sub-section (7), so as to require the Court to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 8-4-919 of the Revised Ordinances of Bountiful, Utah, 1965, as amended, that qualifies as a prior offense under Sub-section (7), as he would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Sub-sections (4) and (5) of this Section. For purposes of determining whether a conviction under Section 8-4-919, of the Revised Ordinances of Bountiful, Utah, 1965, as amended, which qualified as a prior conviction under Sub-section (7), is a first, second, or subsequent conviction under this Section, a previous conviction under this Section or Section 8-4-919 of the Revised Ordinances of Bountiful, Utah, 1965, as amended, is deemed as a prior conviction. Any alcohol rehabilitation program and any community-based or other education program provided for in this Section must be provided by the Department of Social Services.

(7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 8-4-919 of the Revised Ordinances of Bountiful, Utah, 1965, as amended, in satisfaction of, or as a substitute for, an original charge of a violation of this Section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which show whether or not there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The Court shall advise the defendant before accepting the plea offered under this Sub-section of the consequences of a violation of Section 4-8-919 of the Revised Ordinances of Bountiful, Utah, 1965, as amended, as follows: If the Court accepts the defendant's plea of guilty or no contest to a charge of violating Section 8-4-919, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purposes of Sub-section (5) of this Section.

(c) The Court shall notify the Department of Motor Vehicles of each conviction of Section 8-4-919 of the Revised Ordinances of Bountiful, Utah, 1965, as amended, which shall be a prior offense for the purposes of Sub-section (5) of this Section.

(8) A peace officer may, without a warrant, arrest a person for a violation of this Section when the violation is coupled with an accident or collision in which the person is involved and when the violation has, in fact, been committed, although not in his presence, if the officer has reasonable cause to believe that the violation was committed by the person.

8-4-502 DRINKING IN VEHICLE

It is unlawful for any person to drink any alcoholic beverage while in a motor vehicle upon a public roadway.

8-4-503 OPEN CONTAINER IN VEHICLE

(1) It is unlawful for any person to have any alcoholic beverage in an open container in the passenger compartment of a vehicle being operated upon a public roadway.

(2) It is unlawful for any person to drive a vehicle upon a public roadway where there is any alcoholic beverage in an open container in the passenger compartment of the vehicle.

Section 2. Conflict. All ordinances, resolutions and order or parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict hereby repealed, provided however that this repeal should not affect any act done or right accrued, any penalty incurred, any suit, prosecution or proceeding pending, nor shall the repeal hereby have the affect of revising any ordinance theretofore repealed or superceded.

Section 3. Effective date. This Ordinance shall go into effect 12:01 a.m., August 1, 1983.

Passed by the City Council of Bountiful, Utah this 20th day of July, 1983.

Dean A. Stahle
MAYOR

Arden F. Jensen
CITY RECORDER

BOUNTIFUL, UTAH
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